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An Overview of Some Unexpected Consequences of Compensation Law

Prue Vines and Arno Akkermans*

I Introduction

Compensation law concerns the legal recognition of wrongs which cause harm and the giving of compensatory awards in recognition of the wrong and the harm. The area of personal injury is particularly significant and is often thought of as the primary area of compensation law, with a focus on negligence, workers' compensation and other schemes; but other areas of private law are also significant where personal injury and/or economic loss may arise. Thus compensation law may encompass a range of causes of action and a large range of systems, all of which are aimed at compensating persons for their harms. Unfortunately, it has become clear that even where the aims of the compensation systems are met, there are often unintended and unexpected consequences of compensation which may badly affect the person who is supposed to be compensated.

Knowledge of these unintended and unexpected consequences has been in existence since the 1970s and earlier, but until recently there was very little systematic discussion of these issues outside Law Commission and Law Reform body¹ reports. Amongst legal academics, the work of Patrick Atiyah in Britain, including *The Damages Lottery* and *Accidents, Compensation and the Law*² is one example of significant attention being paid to the actual workings of the compensation system and its real impacts on the people involved in it. Dutch academics have been

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¹ For example, *Royal Commission on Civil Liability and Compensation for Personal Injury: Report* (Pearson Report) (London, HMSO, 1978) and its earlier counterparts; *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Woodhouse Report) (New Zealand, 1967); *National Rehabilitation and Compensation Scheme Committee of Inquiry* (Woodhouse Report Australia) (Canberra, AGPS, 1974).

² P Atiyah, *The Damages Lottery* (Oxford, Hart Publishing, 1997); *Accidents, Compensation and the Law*, written by Patrick Atiyah and first published in 1970. He wrote the first four editions and Peter Cane then took over. It is now in its 8th edition, (Cambridge, Cambridge University Press, 2013). See also T Ison, 'The Therapeutic Significance of Compensation Structures' (1986) 64(4) *The Canadian Bar Review*; T Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation* (London, Staples, 1968).

interested in this for some time.³ Others have begun to pay attention to the issues which may be ‘under the radar’, such as how costs affect this area, how insurance affects it and how the structure of legal systems may affect it.⁴ Academic discourse on unexpected consequences is only beginning to become systematic and to involve more than legal academics. We are now beginning to see the development of systematic empirical work evaluating the ‘side-effects’ of compensation law coming from not only legal academics but also from academics in medicine, epidemiology, psychology and sociology. One of these new interdisciplinary research fields is Compensation Health Research, studying the anti-therapeutic effects of legal arrangements and procedures on the victims of accidents who have suffered injury. It is the mission of Compensation Health Research to provide more detailed understanding and higher quality evidence of what exactly causes the detrimental effects of compensation procedures and how they can be restrained, in order to enable informed changes in policy, case law, the modus operandi of the legal profession and relevant institutions, and to inspire legislative change. Australia has been a leader in this field and there is a significant development of international research and collaboration of which this book is a part.

This book arose out of a symposium held at the University of New South Wales, Sydney, Australia in March 2018. It included a range of researchers from the various fields of law, medicine, epidemiology, psychology and sociology and included Australian, Dutch and Italian participants, and research carried out in those countries and in the USA and New Zealand. In this book we have also been able to include an English and Canadian perspective on the field. Much of the discussion concerns issues which are common to not only most common law jurisdictions, but also to civil law jurisdictions.

³ NA Elbers et al, ‘Do Compensation Processes Impair Mental Health? A Meta-Analysis’ (2013) 44:5 *Injury*, 674, doi.org/10.1016/j.injury.2011.11.025; NA Elbers et al, ‘What Do We Know about the Well-being of Claimants in Compensation Processes?’ (2012) 33:2 *Recht der werkelijkheid* 65, ssrn.com/abstract=2562343; AJ Akkermans, ‘Reforming Personal Injury Claims Settlement: Paying More Attention to Emotional Dimension Promotes Victim Recovery’ (2009) *Torts & Products Liability eJournal*, dx.doi.org/10.2139/ssrn.1333214; NA Elbers et al, ‘Procedural Justice and Quality of Life in Compensation Processes’ (2013) *Injury* 1431, doi.org/10.1016/j.injury.2012.08.034; AJ Akkermans and KAPC van Wees, ‘Het letselschadeproces in therapeutisch perspectief: hoe door verwaarlozing van zijn emotionele dimensie het afwikkelingsproces van letselschade tekortschiet in het nastreven van de eigen doeleinden’ (2007) *Tijdschrift voor Vergoeding Personenschade* 103; SD Lindenbergh and AJ Akkermans (eds), *Ervaringen met verhaal van schade. Van patiënten, verkeersslachtoffers, geweldsslachtoffers, burgers en werknemers* (Civilologie / Civilology, 7) (Den Haag, Boom Juridische uitgevers, 2014).

⁴ R Lewis, ‘Insurers and Personal Injury Litigation: Acknowledging “The Elephant in the Living Room”’ (2005) 1 *Journal of Personal Injury Law* 1; R Lewis, ‘The Influence of Insurers upon the System of Compensation for Personal Injury’ (2005) 20(2) *Insurance Research and Practice* 16; R Lewis, ‘Litigation Costs and Before-the-event Insurance: The Key to Access to Justice?’ (2011) 74(2) *Modern Law Review* 272; R Lewis, ‘Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action’ (2018) 2 *Journal of Personal Injury Law* 113; J Morgan, ‘Tort, Insurance and Incoherence’ (2004) 67(3) *Modern Law Review* 384.

II Promising More than Law Can Deliver?

Taking tort law and personal injury law as the paradigm of compensation law, we are all very much aware that the law often promises more than it can deliver. The harm that compensation law sometimes wreaks on the people involved in it ranges from the mental and physical injury caused by stress to the parties who are in the compensation system – which might be relatively unsurprising but, as becomes abundantly clear from several chapters of this book, is to be considered a central factor for negative health impact on claimants – but also to the vicarious harm done to lawyers and administrators acting for plaintiffs, and occasionally defendants. For parties, long delays and their associated uncertainty may create stress, which can create significant psychological or physical injuries separate from the original injury that led to the claim or suit. Sometimes this may also lead to addictions or other unhelpful outcomes. Other unexpected consequences include the creation of a situation where lawyers advise their clients not to apologise following some kind of adverse incident. This was not an intended outcome of the law, but remains a significant issue in civil liability. Other unexpected consequences include situations where the law falls short – for example, where damages awards are insufficient to support an awardee for the time they were expected to last. The consequences of administrative processes used to carry out compensation law in systems such as workers' compensation and motor accidents systems can also be unexpected and unintended. The processes of insurance and the operation of compensation law in interacting with insurance is another area where sometimes unexpected consequences arise.

The actual area in which the compensation law is operating may have significant effects on the dynamics, which might create unexpected consequences. Personal injury caused by a traffic accident and that caused by medical malpractice may be experienced very differently by the parties concerned – for example in medical malpractice there will often be a previous relationship which may affect the view of what the best outcome is. Particular areas may also be differentially insured, so that sporting injuries might be treated very differently from traffic accident injuries. There may be different approaches in relation to individuals affecting outcomes and systemic effects. Different expectations and different personnel and different institutions and systems may interweave to create quite different outcomes. In this book we attempt to scrutinise the warp and weft of this weave in order to illuminate the issues.

Two very significant issues concern the identification of what should be compensated for and the identification of what amounts to, or can be regarded as, compensation. The law has been slow to identify emotional issues as part of the discourse of law. The traditional view of damages, in common law and civil law jurisdictions alike, has been that monetary damages are given to compensate for wrongs, and that the damages are awarded in recognition mostly for physical harm which has created deficits in a person's life which can be made up for by money.

This is not to say that legal systems have not recognised emotional harm, but they have been slow to recognise even catastrophic psychiatric illness, and slower yet in most jurisdictions to recognise emotional harms of lesser seriousness. Non-economic loss or general damages has traditionally been awarded in a way which de-emphasises them, and recent tort reforms in the United States and Australia in particular, have placed thresholds and caps on such damages. The reality of emotional harm is only beginning to be recognised,⁵ both as a matter of the harm the law recognises and compensates for, but also in respect of the unintended harms that the legal system inflicts. These, of course, may be physical, economic and emotional.

III This Book

This book aims to consider in some detail the range of issues that may arise unexpectedly from the ordinary processes of compensation law. It is divided into several parts. There is an Introduction, then a section on current shortcomings of personal injury compensation systems. Part III concerns apologies, and Part IV considers the responsibilities of lawyers.

A. Some Current Shortcomings of Personal Injury Compensation Systems

Part II starts with Chapter 2, ‘Achieving Justice in Personal Injury Compensation: The Need to Address the Emotional Dimensions of Suffering a Wrong’ by Arno Akkermans. He outlines the psychological consequences of suffering a wrong and the ensuing emotional and moral needs of personal injury victims, and argues that compensation procedures generally fail to address these needs but instead often exacerbate them, leading to the experience of injustice and considerably increasing the risk of secondary victimisation. As a growing body of evidence suggests that perceived injustice plays a central role as a predictor of worse health and recovery outcomes, this failure is not only problematic from a justice point of view, but should also be addressed to mitigate the anti-therapeutic effects of compensation procedures. Akkermans submits that these issues go beyond the differences between fault-based and no-fault compensation regimes, and elaborates on possibilities to make claims resolution psychologically more responsive and intelligent regardless of what kind of system is involved, fault-based or no-fault. He identifies adversarialism as a common noxious element, and suggests proactive claims resolution as an antidote, and changing the roles in the game by having

⁵ See H Conway and J Stannard, *Emotional Dynamics of Law and Legal Discourse* (Oxford, Hart Publishing, 2019).

assessments carried out by neutral third parties as the most thorough countermeasure. Other suggestions are to provide a broader scope of services than monetary compensation only, to promote personal contact between those involved in the harm-causing incident, and to promote restorative and procedural justice.

The point of view of a medical researcher considering the relationship between compensation and health is taken in Chapter 3, 'Compensation and Health' by Ian Cameron. He discusses an extensive range of the literature on the subject, setting out the approach taken by the World Health Organization and its sub-organisations. He notes that it is well known that participation in injury compensation schemes may be associated with limited recovery after injuries sustained in motor accidents and other settings. He discusses the empirical data which suggest that this is likely to be a causal relationship rather than a mere correlation. In his chapter he synthesises the findings of all available Compensation Health Research and considers the mechanisms which may underlie the negative effects. Cameron concludes that health and recovery after injury can be improved by appropriate injury insurance scheme design, and suggests some possible useful interventions.

Alex Collie's Chapter 4, 'Apples, Oranges and Bananas' considers a range of Australian compensation schemes from the standpoint of psychology, drawing on a number of empirical studies which show that aspects of the particular design of a compensation scheme really matter to the outcome for the claimant and that no-fault schemes appear to produce superior health or recovery outcomes compared with fault-based schemes. His investigation considers the individual within the context of the complex social system we all live in. Work disability is affected by all the interactions in this social system and the 'control' in the system may be highly dispersed or not in an expected place. This can make the relatively simple analyses which are envisaged by the legal system wholly inadequate. The rapid rate of change of legislation in Australia's workers' compensation systems contributes to a situation which is extremely complex. The chapter reports the results of a major study of participants in workers' compensation schemes across Australia. The results themselves show that often the changes to workers' compensation schemes suffer from a lack of understanding of the extent of the complexity involved and may not achieve the correct goals, or only one of a multiple number of goals – for example, reducing costs as a goal is quite often achieved, but it is often at the expense of rehabilitation or return to work, despite legislative attempts to do both. The research summarised in this chapter suggests that there is substantial scope to improve workers' compensation schemes through more effective practices and policy settings, leading to better health outcomes and significant economic and productivity gains.

Katherine Lippel, Ellen MacEachern and Sonja Senthana in Chapter 5, 'Workers' Compensation in Canada: Experiences of Precariously Employed Workers in the return to Work Process after Injury' bring us a view from Canada of workers' compensation schemes across different provinces. They discuss the experiences of precariously employed workers in the return to work process after injury, which is

an interesting comparison to Alex Collie's chapter on Australian workers' compensation systems and return to work patterns. In Canada each province has its own workers' compensation system. They compare the systems in Quebec and Ontario which differ in relation to the requirements for return to work. In Quebec the employer has the right but no obligation to offer modified work, whereas in Ontario both parties are required to cooperate so that theoretically an employer could be penalised for failing to offer work (although this appears to rarely happen). In Ontario much litigation occurs in relation to the modified work process. Particular aspects of each regime give rise to obvious differences in what happens to workers. For example, in Quebec, benefits are higher than those in Ontario, which meant that sometimes it was not worthwhile for claimants in Ontario to make a claim for what would be a very low benefit. For Quebecois claimants benefits are higher and last longer than in Ontario and this gives the Quebec employer a clear incentive to take the worker back. The picture is extremely complex, which is part of the problem: lawyers may not know who is entitled without extensive investigation in Ontario, workers may be confused, and complex systems may allow employers to duck their obligations, or indeed may create a situation where they are not able to understand their obligations. Lippel et al find that the economic incentives in both systems seem to become finalities in themselves, regardless of the aims of the workers' compensation system itself.

What happens to lump sum compensation when the plaintiff spends their money on housing? In Chapter 6, 'Safe as Houses? Lump Sum Dissipation and Housing', Kylie Burns and Ros Harrington look at this aspect of the effects of lump sum dissipation. This is a very common way for people to use a lump sum, but it is very likely to lead to the person having insufficient resources to manage ordinary living and as many of these people are denied social security, they may become destitute. The authors' research involved a detailed study of the impact of spending lump sums on housing by analysis of social security appeal cases in the Administrative Appeals Tribunal in Australia. They first critique the justifications for lump sum damages, showing how seriously impeded these are by social security rules of various kinds. Lawyers' support for lump sum damages should not be dismissed as (entirely) self-interested – many factors create the desire for lump sums, including people's sense of autonomy and the wish to be free of unwarranted state interference. These are also reasons people spend money on housing. Burns and Harrington show that the social security response to people doing this is to argue that they are 'double-dipping' because their lump sum was supposed to be used for income support and spending on housing is characterised as not income support. This narrow characterisation ignores the cultural and emotional value of housing and the fact that income is often ultimately spent on housing.

Chapter 7 is by Christopher Hodges. It is entitled 'Achieving an Open and Just Culture that Learns and Improves' and it tackles a number of the barriers to open justice in relation to compensation law, particularly in relation to medical malpractice. Hodges regards this as a situation where there are two clashing

institutional cultures: the medical and legal systems. The legal system is focused on individual wrongs, and deals with those after the event, often on the (wrong) assumption that this will deter poor behaviour in future, while the medical system is a *systems* culture where things may go wrong not because of one individual, but because of the nature of the system and where investigation of the *system* is more often what is required. Hodges discusses the evidence of what patients want and various approaches from NHS and other systems, and from behavioural sciences to argue where the possibilities of creating a culture that actually *learns* from its mistakes might lie. His analysis makes clear that both a fault-based system and an adversarial process present strong barriers both to openness of clinical staff with patients about what happened and why, and to medical learning so that future mishaps can be avoided on a wide scale. Hodges submits that ‘fault and adversarial systems are old technology’, and discusses more efficient mechanisms for delivering compensation to those who qualify, and for delivering further functions, especially caring responses, explanations and apologies, aggregating data on adverse events and feeding back information on how to improve both practice and culture in healthcare. He concludes that the traditional legal system is incapable of delivering these objectives.

B. Apologies

The next part, Part III, concerns the treatment of apologies. As an unexpected consequence of compensation law, apologies are a particular issue deserving of investigation. The unexpected thing is the common advice of lawyers to clients not to apologise, which is a consequence of the fear of liability. The compensation systems rarely mention apology and indeed may ignore the subject altogether, but this treatment of apologies comes out of the legal arrangements constituting the compensation system. The fear is always that an apology might mean that liability has been admitted. That is an evidential matter which is not considered particularly here. However, it is well known that apologies in certain circumstances may reduce litigation, or at least increase the likelihood of early settlement. One unexpected consequence of compensation systems which is considered in the chapters on medical and psychological consequences is the failure to pay attention to the extra harms suffered by people who suffer personal injury – these include humiliation, hurt to their sense of justice, and so on. Apologies may operate as remedies in these situations.

Chapter 8, ‘An Incentive Based Approach to Apologies and Compensation’ by Nicola Brutti, considers whether apologies could be regarded as having any real relevance to a legal system such as Italy’s. He points out that apologies come from the moral domain and are almost never referred to in the Italian Civil Code. As a comparative lawyer he suggests that the fact that common law countries have recognised apologies in various ways may allow the Italian legal system to allow the gradual emergence of similar recognition. Can they be remedies? And if so, on

what legal basis? He uses the work of Guido Calabresi to consider the possibility that apologies might be used to impact the consequences of an unlawful act. Protecting apologies may create an incentive to do this and this might be preferable to mandatory or commanded apologies in civil law systems. Despite the risk that incentivising apologies like this might commodify them, there may still be a value in using apologies in this way, and Brutti argues that cultural and legal system differences should be taken into account in determining what the particular legal system or society considers is the proper subject of an apology.

Taking a different tack in Chapter 9, 'Compensation for Intangible Loss: a Closer Look at the Remedial Function of Apologies', Robyn Carroll argues that apologies should be considered as a non-monetary way to compensate for personal injury. The recognition of apologies as matters of morality and of emotional compensation might give apologies an extra role in healing as compensation, allowing a greater recognition in the law of the need for healing the emotional impact of a wrong. She considers whether fault and intention are both relevant to the possibility of using apologies as remedies, whether it is helpful to think of the law relating to apologies as providing incentives for self help in compensation systems, and whether either of these is preferable. In noting that it is fault rather than intention that is relevant, and that apologies do provide incentives for self-help, she argues that there may be concerns if those incentives lead to reduction in the amount of compensation in response to apologies – because under-compensation is a constant problem in the law – but that apology-protecting laws seem to remain the best response to allow parties autonomy in respect of both compensatory and remedial functions.

C. The Responsibilities of Lawyers

Part IV concerns the professional responsibilities of lawyers. A first question of interest is the extent to which personal injury compensation systems use or allow lawyer representation. Clare Scollay, in Chapter 10, 'Exploring the Dynamics of Legal Use in Compensation Systems', explores the influence of compensation schemes and legal services market factors on how claimants use legal services for compensation issues. She notes that most international evidence has focused on person-level factors but little attention has been paid to systemic factors that shape legal use. For example, how do market factors affect claimants' use of legal services for compensation law? How much are lawyers embedded in compensation systems? Some are highly routinised and it is expected that there will be little use of lawyers – indeed lawyers may be banned – while in others lawyers are regarded as 'angels' (as in Chapter 13 by Jennifer Moore). Scollay notes that factors in system design which increase stress and complexity may lead to more lawyer use by complainants. Her chapter is an extremely useful view of the systemic factors which are often ignored in considering how compensation processes affect claimants. She concludes that there is a need to increase the accessibility of legal services and alternatives to legal services, but also a need to look beyond the engagement of

legal services and support claimants to select the most appropriate method of problem resolution: this might not be legal services, as lawyers are not always the most appropriate source of guidance for claimants.

In Chapter 11, 'Addressing the Problem of Lump Sum Compensation Dissipation and Social Security Denial: The Lawyer Contribution', Prue Vines considers what lawyers can do to address the situation described in chapter 6 by Kylie Burns and Ross Harrington, where people who have been awarded lump sum compensation run out of money. This is seemingly an egregious example of unexpected consequences of compensation law, since the rule for awarding compensation is to put the plaintiff back in the position he or she would have been in had the wrong not occurred. Vines notes a number of systemic issues which could be addressed by lawyers, including changing settlement processes, altering how costs are created and explained to clients, and changing the way lump sum compensation amounts are communicated to social security. Given that many of these people run out of money but are denied social security, this is a significant issue that deserves serious attention.

In Chapter 12, Genevieve Grant and Christine Parker consider the ethical implications of findings from empirical research linking compensation systems with major personal stress and poor health outcomes amongst injury claimants. How should lawyers respond to the knowledge that the compensation process may do harm? The authors draw on Parker and Evans' four ethical approaches to lawyering to analyse the potential responses lawyers might make: The Adversarial Advocate, the Responsible Lawyer, the Ethics of Care and the Moral Activist. They suggest that, in addition to implementing aspects of the canvassed ethics of care approach, lawyers need to take responsible lawyering and moral activist responsibility for justice of the existing system and its accompanying institutions. A key focus for their work should be the opportunity to work collaboratively with schemes, insurers and regulators to implement improved cultures and practices. While attention is often drawn to the lawyer as advocate for the individual client, lawyers also contribute to system design, change, reform and evaluation, through advocacy by peak bodies, liaison and reference groups, having input into policies and protocols that shape how claims are managed and processed and the compensation system is implemented as a matter of practice. These opportunities could be used to promote initiatives such as dispute resolution systems that are about a more integrated and holistic sense of justice – including restorative justice and apology where appropriate.

Ending this book with a most encouraging note, Jennifer Moore in Chapter 13 discusses empirical research about New Zealand and American patients' and family members' experiences of the role of lawyers in non-litigation approaches to medical injuries. This shows that lawyers can play an important role in facilitating resolution after medical injury. In contrast to the overwhelming literature which depicts lawyers as 'devils', this chapter reveals that competent lawyers, who approach resolution after medical injury as a collaborative process, may play a vital role in

facilitating fairness, creating opportunities for injured patients to be heard, and restoring trust between injured patients and health care providers. This might be epitomised by the description by injured patients and family members of their lawyers as ‘angels’. This narrative is encouraging for lawyers, injured patients, family members, and health care providers. The discussed research highlights the valuable role of lawyers who promote resolution and restore trust in the therapeutic relationship. As health care organisations strive to provide care that meets patients’ needs, an opportunity exists to include competent and collaborative lawyers in resolution processes after medical injury.

IV Conclusion: Not So Unexpected?

We hope that this book will serve to alert lawyers, medical practitioners and legislators who develop the policies and laws which manage compensation in the various legal systems, that these systems are hugely complex and have a very significant impact on their participants. A person applying for compensation seeks what seems to be a simple goal – to make their situation better by being given compensation to help them lead their life. But very often the compensation system itself becomes the problem that the injured participant has to solve. Many people have non-pecuniary goals as well in engaging compensation systems, and the failure of these systems to address those needs seems to be an important factor for falling short in achieving their restitutionary goals. We would hope that these situations would become not so unexpected as this research might suggest, and that people become better aware of the multiple unexpected consequences that can materialise. This involves an assignment for professionals from several different disciplines. By conducting research that zooms in more detail on to compensation trajectories and the experiences of those who navigate them, psychologists and health researchers might shed more light on how compensation systems can be made more successful in achieving their mission in restitution, recovery, and rehabilitation. Compensation Health Research seems to have only just begun to gain more insight into the complex relationship between compensation systems and health outcomes. This relationship needs to be unraveled in more detail to allow the evidence found to be given the weight it deserves for the operation and design of compensation systems. But as Chapters 10–13 in particular illustrate, it is above all lawyers in various roles who have a major responsibility to improve the functioning of existing compensation systems and to contribute to the design of better ones. And of course, planners and policy makers, and legislators should also consider the complexity of compensation systems and their consequences thoroughly when creating systems and changing them. In a speedy world this is obviously a difficult matter, but this book should establish how important it is for the people these systems are aimed at, that the consequences of the compensation law are known, thought about and become not so unexpected.